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No. 665

IN THE

SUPREME COURT

OF THE

United States

October Term, 1956

FREDERICK I. RICHMAN,
Petitioner,

vs.

LYDA TIDWELL, ROY E. HALLBERG, as Receiver of all the real and personal property constituting the former Richman Trust, and JOHN WHYTE, Attorney for Receiver,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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FREDERICK I. RICHMAN, *Petitioner,* vs. LYDA TIDWELL, ROY E. HALLBERG, as Receiver of all the real and personal property constituting the former Richman Trust, and JOHN WHYTE, Attorney for Receiver, *Respondents.*	No.....

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit made and entered in the above case on June 7, 1956.

OPINIONS BELOW

The decision of the District Court for the Southern District of California herein is reported at 127 F.

Supp. 526 (R. 3). The Order and Judgment In Re Settlement of Receiver's Account, Fees and Distribution of Funds in Hands of Receiver (R. 190), the subject of the appeal to the Court of Appeals, is unreported and is reproduced in the Appendix hereto at pages 17 to 24.

The Opinion of the Court of Appeals for the Ninth Circuit made and entered June 7, 1956 is reported at 234 F. 2d 361, and is found in the Appendix hereto at page 1, and its Judgment at page 16.

Petitioner's Petition for Rehearing to the Court of Appeals for the Ninth Circuit was denied on October 29, 1956, without opinion.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the conduct of a trial judge in appointing an inexperienced acquaintance and neighbor as receiver of substantial trust assets, personally vouching for the integrity, character and experience of such receiver; ignoring the receiver's gross dereliction of duty in mismanagement of the assets, in delegating his duties to his wife while concealing his full time employment by the County of Orange, and in material misrepresentations made to court and counsel; refusing to disqualify himself when the receiver's misrepre-

sentations became public; and, finally, granting such receiver $6,000 for but three month's services — or $2,000 a month, when his Orange County full time salary was $355 a month during the same three months —was a gross abuse of judicial discretion.

2. Whether the eleven page decision of the Court of Appeals herein, impliedly admitting these record facts, but dismissing them summarily without discussion with the brief statement that petitioner's contentions were "without merit" so far sanctioned a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

STATUTES, RULES AND REGULATIONS INVOLVED

Section 455 of Title 28, United States Code, provides as follows:

> "Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein."

CANONS OF JUDICIAL ETHICS ADOPTED BY THE AMERICAN BAR ASSOCIATION

4. AVOIDANCE OF IMPROPRIETY

A judge's official conduct should be free from impropriety and the appearance of impropriety; he should avoid infractions of law; and his personal behavior, not only upon the Bench and in the performance of judicial duties, but also in his every day life, should be beyond reproach.

5. ESSENTIAL CONDUCT.

A judge should be temperate, attentive, patient, impartial, and, since he is to administer the law and apply it to the facts, he should be studious of the principles of the law and diligent in endeavoring to ascertain the facts.

. . .

12. APPOINTEES OF THE JUDICIARY AND THEIR COMPENSATION

Trustees, receivers, masters, referees, guardians and other persons appointed by a judge to aid in the administration of justice should have the strictest probity and impartiality and should be selected with a view solely to their character and fitness. The power of making such appointments should not be exercised by him for personal or partisan advantage. He should not permit his appointments to be controlled by others than himself. He should also avoid nepotism and undue favoritism in his appointments.

While not hesitating to fix or approve just amounts, he should be most scrupulous in granting or approving compensation for the services or charges of such appointees to avoid excessive allowances, whether or not excepted to or complained of. He cannot rid himself of this responsibility by the consent of counsel.

13. KINSHIP OR INFLUENCE

A judge should not act in a controversy where a near relative is a party; he should not suffer his conduct to justify the impression that any person can improperly influence him or unduly enjoy his favor, or that he is affected by the kinship, rank, position or influence of any party or other person.

. . .

19. JUDICIAL OPINIONS

In disposing of controverted cases, a judge should indicate the reasons for his action in an opinion showing that he has not disregarded or overlooked serious arguments of counsel. He thus shows his full understanding of the case, avoids the suspicion of arbitrary conclusion, promotes confidence in his intellectual integrity and may contribute useful precedent to the growth of law.

. . .

. . .

34. A SUMMARY OF JUDICIAL OBLIGATION

In every particular his conduct should be above reproach. He should be conscientious, studious, thorough,

courteous, patient, punctual, just, impartial, fearless of public clamor, regardless of public praise, and indifferent to private political or partisan influences; he should administer justice according to law, and deal with his appointments as a public trust; he should not allow other affairs or his private interests to interfere with the prompt and proper performance of his judicial duties, nor should he administer the office for the purpose of advancing his personal ambitions or increasing his popularity.

STATEMENT OF FACTS

This petition involves serious charges of abuse of discretion and misconduct by the trial judge.

Such charges arose out of an action between Lyda Tidwell and Frederick I. Richman, a brother and sister, each of whom was a trustee and trustor under a Declaration of Trust. Plaintiff Tidwell brought suit asking the Court to void the Trust and for a distribution of assets .(R. 3). The trial court, after trial, determined that the Trust should be voided and distribution made in accordance with the complaint (R. 5). No question is here presented as to such judgment or decision.

The trial Judge forthwith appointed an acquaintance and neighbor as receiver to administer the very substantial assets of the Trust pending distribution. (R. 21). These assets were principally composed of five large income producing apartment houses, comprising 410 units, valued at over $1,000,000.

This petition is directed solely to the propriety of the trial Judge's conduct in selecting such receiver, rejecting objections by the parties as to the competency and ability of such receiver, refusing to later disqualify himself when the receiver's dishonesty and inexperience became known, and granting excessive receiver's fees ridiculously disproportionate to the services actually rendered.

The serious character of the charges of gross abuse of judicial discretion were set forth at pp. 16-46 of Appellant's Opening Brief in the Court of Appeals. Appellant Tidwell did not controvert the charges and Respondents admitted most of the occurrences, asserting that some minute details were colored, (Resp. Br. pp. 9-34).

The undenied and admitted charges were that the Trial Judge represented to the parties:

(1) That the proposed receiver was able, competent and experienced in income property management (R. 204);

(2) That the proposed receiver "was for some years associated with a property management operation in Chicago" (R. 205);

(3) That the proposed receiver's "main vocation for some years was in the management of real properties, sometimes in connection with receiverships" (R. 210);

(4) That the proposed receiver had managed apartment property for elderly relatives in Southern California (R. 205);

(5) That the proposed receiver's "place of business" was in Pasadena although he lived in Corona del Mar (R. 215);

(6) That the proposed receiver was available to act (R. 205).

The proposed receiver confirmed each of these representations when questioned by the Court (R. 210).

In fact, all of these representations were false in whole or in part. The facts are that:

(1) The receiver had lived on the same block as the Trial Judge during the period 1947-1952 (R. 367, 430) and known him;

(2) The receiver had never acted as a receiver, but had only been an employee of a defunct bank bondholder in Chicago for a short time almost twenty-five years ago (R. 377-378);

(3) The receiver had no experience in managing apartment house income property, except for less than one year, in 1949, five years prior to his appointment herein when he managed a small, seventeen unit apartment (R. 370); and that at the time of the appointment had title to a four-unit unfurnished flat;

(4) The receiver had no "place of business" in Pasadena, although he did use one of the flats as a mailing address and letter drop. (R. 377);

(5) The receiver was not available to act, since he was employed full time as a minor white collar county employee in a town forty miles away (R. 328).

Other admitted circumstances were that the receiver and his attorney, before qualifying and taking oath, took control of a bank account and five large Los Angeles apartment houses, which assets primarily constituted the estate. The receiver and attorney were delayed in qualifying until, as the attorney for the receiver testified, the Trial Judge by 'phone advised the bonding company that the premium for the receiver's bond would be paid out of the receivership assets. (R. 555-6).

At this very time appellant Richman, who the trial judge in his opinion minutely describes as a capable business man and member of the Bar, had pending before the Trial Judge a motion for an order fixing supersedeas bond to avoid the extraordinary remedy of and costly receivership.

One of the more important facts misrepresented by the receiver, and vouched for by the Trial Judge (R. 205), was his availability to act as a receiver and his prior earnings. The record is clear that the receiver applied for work as a Deputy Assessor for the County of Orange before he represented he was available to act as receiver (R. 326). He accepted full-time employment from Orange County a few days after his appointment, at a salary of $355.00 per month. He continued to be such full-time employee during the whole three months period of the receivership. (R. 328). His last previous employment had been by a fishing pole manufacturer at $350.00 a month.

Thus, the receiver deliberately misrepresented the facts, since he obviously could not hold down a full-

time job in Orange County and simultaneously discharge his duties as receiver in Los Angeles County forty miles away in the diligent manner required by law.

Another significant fact was that the receiver surreptitiously delegated his receiver's duties to his wife, while he performed his job as a modestly paid full-time Orange County employee. He admitted he delegated his receivership duties to his secretary, Miss Cosgrove, the maiden name of his wife, (R. 380) and that he never disclosed to anyone that he was employed by the County of Orange. (R. 526).

As an inevitable result of the receiver's dereliction of duty, the Trust assets were grossly mismanaged. Two representative instances will be illustrative. The receiver was not available when the refrigeration facilities in one of the large apartment houses failed. A smog control citation was served upon one of the receiver's apartment house managers. Appellant Richman, after a criminal warrant had issued for him to appear in a criminal court without notice, unsuccessfully attempted to find out where the receiver was and what had occurred and for this was accused by the attorney for the receiver of spying. (R. 643).

In February, 1954, the parties entered into a settlement agreement and stipulation relieving the receiver from active duties (R. 54). Thereafter, the Receiver's Account and Petitions for Fees were filed, together with objections of the parties (R. 75, 125, 145). The receiver petitioned for "reasonable fees", contrary to

the local rule of the court, requiring a receiver in his petition to state the fee he seeks. (Rule 18 (c) (4), Local Rules, Southern District of California). However, the Trial Judge waived this rule in the receiver's favor (R. 254, 624). The Court Minutes of April 12, 1954 (R. 157) record the following:

> "The Court makes a statement that no evidence will be taken concerning the appointment of the receiver in this action."

Thereafter Petitioner Richman filed a petition with the Court, requesting that the Trial Judge disqualify himself from hearing the Accounting and Petition for Fees, on the ground that the Trial Judge was a necessary and material witness to the misrepresentations of the receiver as to his experience, qualifications and availability under 28 U.S.C. 455 (R. 158). The Trial Judge did not act upon the Petition. The issue of the receiver's unclean hands, resulted in the Court ruling and stating:

> "You can't call the Court on that subject. We are not going into it any further. It is closed." (R. 456).

Despite the Trial Judge's awareness of the facts he refused to disqualify himself, although clearly devoid of that impartiality and objectivity required both by statute and judicial ethics of a trier of fact, and went on to allow the receiver $6,000 in fees, and $1800 attorney's fees, for but a three month "part time" receivership. (R. 190), observing that "consideration was given to the greater than usual vexation

which was visited upon him" by defending his conduct in court (R. 188).

The Court of Appeals below affirmed the District Court's conduct in one brief sentence as follows:

> "We wish to observe here that there is no merit in the defendant's contentions as to disqualification of the Trial Court, defendant's attack on receiver's qualifications, value of his services, or value of the services of the attorney for the receiver."

ARGUMENT

This case is a classic example of gross abuse of judicial discretion. As such it merits review and exercise of this Honorable Court's power of supervision. The integrity and impartiality of federal trial courts have always been jealously guarded symbols of our form of government. Instances of gross abuse of discretion by individual trial judges therefore become of greater significance and importance than the merits of any individual case, because of the discredit they cast upon the entire administration of justice, and the subtle erosion of public standards of morality worked thereby.

The record herein is replete with the evidence of the trial court's misconduct. Ordinarily, therefore, the review by the Court of Appeals would furnish a sufficient safeguard to any injured party. However, in this case, the Court of Appeals for the Ninth Circuit, although impliedly admitting the truth of the record facts, summarily dismissed the serious charges of

judicial misconduct by but one brief sentence in an eleven-page opinion.

Since essentially the question presented herein is a factual question of judicial ethics and propriety, petitioner does not deem it necessary to here exhaustively argue the elementary legal principles involved. However, it is not amiss to quote from the recent case of *Crites, Inc. v. Prudential Ins. Co.,* (1944) 322 U. S. 408, 414, 88 L.ed. 1356, 1360, where this Honorable Court reversed a certain receivership fee allowance as a clear abuse of discretion, stating:

> "It is obvious, moreover, that Simkins (the receiver) was bound to perform his duties with the high degree of care demanded of a trustee or other similar fiduciary."

The Trial Court's statement on April 12, 1954 that no evidence would be taken on the propriety of the receiver's appointment (R. 157) was a prejudgment of the parties' objection to the receiver's account, beyond the bounds of sound judicial discretion. His later refusal to disqualify himself, after knowledge of the receiver's misrepresentations, and notice of the parties need to call him as a material witness, and his later limitation of the cross-examination of the receiver was a violation of Section 455 of Title 28, United States Code.

Petitioner further submits that the decision on the questions here presented should be weighed in the scale against the Canons of Judicial Ethics. Such voluntary rules are, of course, not legally binding.

However, their infraction by responsible judges should not be treated lightly on technical grounds, to the prejudice of injured litigants.

As Mr. Justice Frankfurter said, in his opinion discussing the subject of free speech and fair trial in *Bridges vs. California,* 314 U.S. 252, 289; 86 L. ed. 194, 217:

> " . . . Judges as persons, or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions. Just because the holders of judicial office are identified with the interests of justice they may forget their common human frailties and fallibilities. There have sometimes been martinets upon the bench as there have also been pompous wielders of authority who have used the paraphernalia of power in support of what they called their dignity. Therefore judges must be kept mindful of their limitations and of their ultimate public responsibility by a vigorous stream of criticism expressed with candor however blunt."

Under these circumstances, petitioner submits that a writ of certiorari should issue, since the action of the Court of Appeals has clearly sanctioned such a material departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

CONCLUSION

For the reasons stated, petitioner prays that the writ of certiorari be granted.

Respectfully submitted,

JOSEPH T. ENRIGHT
Counsel for Petitioner.

December ....., 1956.

APPENDIX

A. Opinion of the United States Court of Appeals for the Ninth Circuit

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FREDERICK I. RICHMAN, *Appellant,*

vs.

LYDA TIDWELL, ROY E. HALLBERG, as Receiver of all the real and personal property constituting the former Richman Trust, and JOHN WHYTE, attorney for Receiver, *Appellees.*

LYDA TIDWELL, *Appellant,*

vs.

FREDERICK I. RICHMAN, ROY E. HALLBERG, as Receiver of all the real and personal property constituting the former Richman Trust, and JOHN WHYTE, attorney for Receiver, *Appellees.*

No. 14,702

June 7, 1956

Appeal from the United States District Court
for the Southern District of California,
Central Division.

Before FEE and CHAMBERS, Circuit Judges,
and FOLEY, District Judge.

FOLEY, District Judge.

Lyda Tidwell, a citizen of New Mexico, brought an action against Frederick I. Richman, a citizen of the State of California; she sought termination of a trust and the appointment of a receiver.

On January 21, 1954, the Court entered its judgment providing, inter alia, that the said trust, dated November 1, 1945, and two amendments thereto, are void and canceled, and that a receiver be appointed to hold all of the assets pending an accounting and determination of the respective interests of the parties. The parties endeavored to settle remaining issues by acceptance of proposals contained in a letter of Richman's counsel dated February 19, 1954. The accepted proposals which are pertinent here are the following:

> "1. Both parties mutually release each other of any and all claims known or unknown, that they have against the other from the beginning of the world to the present time.
>
> "2. Both parties shall bear their own expenses.
>
> "3. . . .
>
> "4. A stipulation shall be entered into that the receiver be relieved as of February 28, 1954,

and whoever buys shall be entitled to all receipts and shall assume all operating obligations of the the Richman Trust from March 1, 1954 . . .

"5. The receiver shall file his report and after the payment and/or provision for all of the receiver's claims and expenses and operating obligations of Richman Trust to February 28, 1954, any funds remaining shall be divided equally between Mrs. Tidwell and Mr. Richman.

"6. Richman Trust shall be terminated and the property therein and now being controlled by the receiver distributed in equal shares as undivided interests to Mrs. Tidwell and Mr. Richman.

"7. Mrs. Tidwell shall have her election to either buy Mr. Richman's undivided half interest in the assets of Richman Trust, or to sell her undivided one-half interest in the assets of Richman Trust for the sum of $600,000.00, payable on the following basis:

"(a) $100,000.00 cash shall be paid February 26, 1954 by the party buying to the other upon the notification by Mrs. Tidwell as to her determination of whether she is buying or selling the undivided interest of the assets in Richman Trust.

"(b) $500,000.00 shall be paid through escrow to the party selling on or before May 1, 1954.

"(c) In the event the $500,000.00 is not paid through escrow on or before May 1, 1954, then a receiver may be reinstated to operate the assets of Richman Trust and the $100,000.00 paid upon Mrs. Tidwell's election shall be forfeited and all items hereinabove enumerated, except the forfeiture of the $100,000.00 and retention of operating income as provided in 4 hereof, shall be of no force and

effect, and the parties shall be in the same position as they now are except for the forfeiture of the $100,000.00 and retention of operating income."

The stipulation entered into compliance with accepted proposal No. 4 provided:

". . . Whereas Lyda Tidwell, plaintiff, under said agreement, is to purchase all of defendant, Frederick I. Richman's share in the assets referred to in this trial as the 'Richman Trust', and hereinafter referred to as the Richman Trust, and Lyda Tidwell already having paid to said Frederick I. Richman the sum of One Hundred Thousand Dollars ($100,000.00) in pursuance of the terms of the above said agreement, and the parties hereto desiring also, in accordance with the terms of said agreement, that the Receiver be relieved of his responsibilities in connection with the management, control and possession of the assets of the said Richman Trust, with the exception of money in bank and now under the control of the Receiver;

"Now, Therefore, It Is Hereby Stipulated by and between counsel for plaintiff, Lyda Tidwell, and defendant, Frederick I. Richman, that the Receiver, Roy E. Hallberg, be relieved of the possession, control and management of the assets of the said Richman Trust, excepting funds in bank and under the control of said Receiver, as of five o'clock Sunday, February 28, 1954, and that plaintiff, Lyda Tidwell, be given possession, control and management of all the assets of the Richman Trust with the exception of money in bank, as above stated, . . . and that the court make an order for the purpose of carrying this Stipulation into effect."

The Order intending to carry the stipulation into effect was made February 26, 1954.

On March 3, 1954, plaintiff filed a dismissal of the action and on March 22, 1954, the Court entered the following Order:

> "It is so ordered except that jurisdiction is retained over all monies, credits and assets in possession or under control of Roy E. Hallberg, receiver heretofore appointed herein, and over said receiver and to fix his compensation and allow his expenses including fee for his attorney."

Order in re settlement of receiver's account, fees and distribution of funds in hands of receiver was made and entered November 19, 1954.

Frederick I. Richman appeals from said Order and Judgment in re settlement of receiver's account. Lyda Tidwell appeals from that portion of said Order in re settlement of receiver's account which awards the sum of $4,974.56, or any part thereof, to Frederick I. Richman and which limits the distribution to Lyda Tidwell to the sum of $7,833.95.

Lyda Tidwell and Frederick I. Richman will be hereinafter referred to as plaintiff and defendant.

There is no merit in defendant's first contention that the Trial Court lacked jurisdiction to settle all disputes between Richman and Tidwell as to the distribution of funds remaining in the receiver's hands. Defendant's suggestion in his Objections and Answer to Report of Receiver that each of the parties is entitled

to apply to a court of competent jurisdiction for determination of their respective rights under the settlement agreement is frivolous. In *Pacific Bank v. Madera Fruit & Land Co.*, 57 P. 462, after dismissal of the case, plaintiff moved to dismiss the account and petition of a receiver on the ground that by the judgment of dismissal the Court had lost jurisdiction to settle the accounts of the receiver. The Trial Court overruled the motion and plaintiff appealed. There, the Court, quoting from Beach on Receivers, stated:

> " 'The end of the suit, its final adjudication, gives cause for the discharge of the receiver, but does not, ipso facto, effect his discharge, which results only from an order or decree of court so directing. After the settlement of the suit the receiver must have time and opportunity to prepare and present his accounts, and for the adjustment of the details of the receivership. . . . The dismissal of the action does not discharge the receiver from accountability to the court which appointed him. He is an officer of the court, and subject to its order in relation to the property placed in his hands as receiver until discharged by the court.' "

The Supreme Court of the United States in Atlantic Trust Company v. Chapman, 208 U.S. 360, 370, 52 L.Ed. 528, 533, upon writ of certiorari from this Court, speaking through Mr. Justice Harlan, said:

> ". . . Immediately upon such appointment and after the qualification of the receiver, the property passed into the custody of the law, and thenceforward its administration was wholly under the control of the court by its officer or creature, the receiver."

We wish to observe here that there is no merit in the defendant's contentions as to disqualification of the Trial Court, defendant's attack on receiver's qualifications, value of his services, or value of the services of the attorney for the receiver. The receiver was clearly entitled to credit in the sum of $89.20 for his expenses incurred in the taking of depositions. In the Order of settling account, the Court found that the receiver, at the time of the entry of the Order, had in his possession $20,697.71 and was entitled to the following credits:

$6,000.00	receiver's fee
1,800.00	fees of attorney for receiver
89.20	expenses of deposition incurred by receiver.

Thus there remained the sum of $12,808.51 to be distributed between plaintiff and defendant as their interests appeared.

The Court correctly interpreted the agreement of the parties and their stipulation in holding that defendant Richman was not entitled to any of the following:

> The petty cash fund of $785.00 and rentals totalling $1,290.59.

The disputed rental item of $1,290.59 represents rentals collected by the managers of the apartments on February 26, 27 and 28, 1954. Neither the petty cash fund nor the above item of rents were included in "funds in bank" and were properly considered as among assets purchased by plaintiff.

Defendant complains that the Court erred in failing to charge the plaintiff's interest in the balance of the funds in the amount of $2,027.28 being a sum of money paid by the receiver on account of an obligation assumed and required to be paid by plaintiff in accordance with the settlement agreement made by plaintiff and defendant terminating the receivership and settling their dispute. This item of $2,027.28, being a payment made by the receiver on February 27, 1954, of an installment payment upon a note secured by a deed of trust on property of the Richman Trust, if not among the obligations assumed by plaintiff by virtue of accepted proposal No. 4, was an obligation necessary to be paid if the plaintiff was to continue in the enjoyment of the real property affected thereby. After the sale of his interest, defendant Richman could not be expected or required to make any payment on an existing encumbrance and the obligation secured by the deed of trust, for all purposes here, should be treated as an encumbrance, 25 Cal. Jur. 12, §4, Trust Deeds.

Defendant Richman complains that the Court erred in its Order in re settlement of receiver's account by granting the plaintiff a credit in the amount of $2,476.38, being one-half the real property taxes which were paid by the plaintiff, when prorating the balance of the funds remaining in the possession of the receiver between the plaintiff and defendant. Among other items, plaintiff Tidwell paid out of her own funds the real property taxes for the first six months of 1954. She contends that she should be reimbursed by a pro-

ration of such taxes to the end that the burden of paying the taxes for the first six months of 1954 should be distributed proportionately, that is, that an apportionment be made for the first two months of 1954. Accepted proposal No. 4, binds her to assume all operating obligations from March 1, 1954, but she did not agree to and was not bound to assume payment of any operating obligation which may be considered as having accrued prior to March 1, 1954. In *Fleischer v. Pelton Steel Co.,* 198 N.W. 444, 447, the Supreme Court of Wisconsin held:

> "While a tax is not in the ordinary sense a 'debt' . . . because it lacks the element of contractual obligation, it is nevertheless a liability properly chargeable as an 'operating expense.' Citing cases."

Therefore, the defendant's interest in the balance of the funds should be charged in the amount of $2,476.38, being one-half of the taxes so paid by plaintiff Tidwell and her interest credited therewith.

While the plaintiff is entitled to be reimbursed for one-half of the February utility bills paid by her after assuming possession of the apartment houses on February 28, 1954, the record does not disclose any stipulation or evidence which would support a finding that the amount so paid equalled $1,877.50. On remand to the District Court the amount of the utility bills paid by plaintiff for the month of February, 1954, should be resolved by the parties or by further hearing. After determination of the correct amount paid by plaintiff,

the defendant's interest in the balance of the funds should be charged with one-half thereof and plaintiff's interest should be credited with one-half thereof.

We agree that the Court erred "by granting the plaintiff a credit in the amount of $1,300.00, being one-half the cost of catalytic units paid for by plaintiff, when prorating the balance of the funds remaining in the possession of the receiver between the plaintiff and the defendant." The catalytic units were contracted for before the receiver was appointed and the contracts of purchase provided that the balance of the purchase price was payable upon receipt of Los Angeles County Air Pollution Control District's permits to operate which were issued March 9 and June 2, 1954. This balance in the sum of $2,600.00 was paid by plaintiff. She assumed, by accepted proposal No. 4, to pay all the operating obligations of the Richman Trust which became due from March 1, 1954, without regard to when same were contracted.

In the Order settling the account, the Court decided that Richman was entitled to a reasonable fee for services rendered by him as agent for the dissolved Trust, which fee is fixed at 6% of the gross revenues for the month of November, 1953, which revenues aggregated $31,043.33, or a fee of $1,862.60, one-half of which was the obligation of plaintiff. The letter containing defendant's proposals, in a preliminary paragraph, recited:

> ". . . Any agreement made contemplates a full release of any and all claims that either Mr. Rich-

> man or Mrs. Tidwell have or think they have against the other from the beginning of the world to the present time. If this matter is going to be terminated, it is my desire to have it terminated completely and not by use of trick terminology which might subject it to other law suits in the future."

This purpose of defendant was accomplished by accepted proposal No. 1. The claim of defendant against plaintiff for services and expenses occasioned by defendant's management of the Trust up to the time of the appointment of the receiver should be considered in the light of all the accepted proposals and the announced purpose of defendant Richman in making the same. The contention of Richman that his claim for November services prior to receivership was a claim against the Trust, not against plaintiff, is, in view of the agreement of the parties, a mere play upon words. It is contrary to his expressed desire and the purpose of both parties that all controversies be terminated by the settlement. No mention of such an item is to be found in the accepted proposals.

In its Memorandum Decision of November 30, 1953, the Court, in the opening paragraph of said Decision, stated:

> "Plaintiff has brought suit asking this Court to permit her to void the Declaration of Trust and for a distribution of the assets of the estate to the trustors. She claims that the Trust is a voidable one because of (1) undue influence in the inception; (2) fraud in the inception; (3) fraudulent

> and improper management; and (4) that after the establishment of the Trust it has been fraudulently and wrongfully managed by the defendant to such an extent that he should be removed as agent of the trustees and the Trust should be terminated."

Near the conclusion of said Memorandum the Court declared:

> "The Declaration of Trust was, and is, voidable; and as plaintiff has sued to set aside for the foregoing reasons, the Court holds that she has established her case, and the corpus of the Trust shall be distributed according to the interests of the Trustors. All questions and matters, except that the Trust be set aside and the corpus distributed, are expressly reserved to be treated in further proceedings here in the administration of a distributing receivership which will be ordered concurrently with this Memorandum."

The Memorandum Decision of November 30, 1953, exhibits the state of the litigation at the time of the occurrence of the following events: The receiver Hallberg was appointed the same day and then followed, about February 25, 1954, the settlement by the parties of the remaining issues.

From the foregoing it will be thus noted that in entering into the settlement, plaintiff Tidwell abandoned claims which, without the settlement, she could have and undoubtedly would have pursued against the defendant. It would be inequitable to allow Richman to assert a claim which by proposal No. 1 he agreed to abandon by the use of what he himself termed "trick

terminology" which he sought to protect himself against in his letter of proposals for settlement by the language: "If this matter is going to be terminated, it is my desire to have it terminated completely and not by use of trick terminology which might subject it to other law suits in the future."

Therefore, that part of the Order settling the receiver's account allowing defendant Richman a credit for services rendered by him as agent for the dissolved Trust is erroneous, and he is not entitled to credit in any amount for such services.

In the Order in re settlement of receiver's account the Court held that "plaintiff is not entitled to any credits for expenses incurred by her in said escrow on behalf of defendant Richman as the seller therein." In the escrow instructions of February 26, 1954, plaintiff Tidwell, in addition to other matters, stated:

> "I will also hand to you for delivery to F. I. Richman at close of escrow a full and complete and general release in favor of F. I. Richman and all other parties named as Defendants in the above entitled United States District Court Action when you can hold for me a full and complete release in my favor executed by said Defendants. . . . Notwithstanding the printed provision in these instructions I agree to pay, in addition to the buyer's costs and expenses in this escrow all of the seller's costs and expenses of this escrow and the cost of the policy of title insurance, revenue stamps and recording and filing all instruments and documents and the seller's escrow fee.

> "These instructions are not intended to and do not amend, alter, modify or supersede any agreements outside of escrow between F. I. Richman and me and with which agreement California Bank is not to be concerned."

These items were paid by her. She argues that at the time of the execution of the escrow instructions defendant Richman insisted that the escrow instructions provide that plaintiff pay the seller's as well as the buyer's escrow fees and that the buyer Tidwell pay for the Internal Revenue stamps to be placed on the deed of conveyance, and explains her reason for agreeing to make such payments by her statement: "The escrow company is hardly the place to argue such points." If defendant Richman, at the time of formulating the escrow instructions, insisted that plaintiff pay for the Internal Revenue stamps and all the escrow costs, he, to that extent, repudiated his agreement. Rather than pursue any remedy she might have to enforce the agreement, she waived her right to any credits for such payments by stating in the escrow instructions that she would pay the same.

At this point it might be well to refer to an argument of Richman having to do with the rent and tax items considered above. Referring to escrow instructions he says that when plaintiff Tidwell and her attorneys signed the instructions which specifically provided that there would be no proration of taxes, the escrow instructions contained the provision:

" 'The following adjustments only are required in this escrow.'

"No adjustment or prorations were provided for. Specifically blank spaces were provided for the insertion of the date for prorating taxes and rents and the word 'none' was inserted."

These statements in the escrow instructions were what they purported to be, merely instructions to the bank affecting distribution of funds which might come into its possession through the escrow and in no way affected the agreement of the parties to this litigation.

A $158.00 compensation insurance refund item was also a subject of controversy. Defendant Richman testified that the item was now shown in the receiver's report and that he did not know whether it had been refunded. Obviously such refund, if made, was an asset of the Trust and is to be considered as included within the one-half interest sold by defendant to plaintiff.

The Order and Judgment in re settlement of receiver's account is modified as hereinabove indicated. The matter is remanded to the District Court to take such further action as may be advised not inconsistent with this Opinion.

The costs of this appeal, including costs of the transcript, shall be borne equally by appellant and cross-appellant.

(Endorsed:) Opinion. Filed June 7, 1956.
Paul P. O'Brien, Clerk.

B. Judgment of the United States Court of Appeals for the Ninth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FREDERICK I. RICHMAN, Appellant,	)	
vs.	)	
LYDA TIDWELL, et al., etc., Appellees.	)	
	)	No. 14,702
LYDA TIDWELL, Appellant,	)	
vs.	)	
FREDERICK I. RICHMAN, et al., etc., Appellees.	)	

JUDGMENT

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the order and judgment of the said District Court in this cause in re: settlement of receiver's account being and hereby is modified pursuant to the opinion of this court, and that

this cause be, and hereby is remanded to the said District Court to take such further action as may be advised not inconsistent with the opinion of this court, each party to bear his or her own costs on appeal.

IT IS FURTHER ORDERED and adjudged by this court that interest be allowed on that portion of the District Court's judgment awarding fees to Receiver Roy E. Hallberg and his attorney John Whyte and that such interest be charged to appellant Richman.

(ENDORSED) Judgment.
Filed and entered June 7, 1956, as amended by Order of October 29, 1956. PAUL P. O'BRIEN, Clerk.

C. Order and Judgment In Re Settlement of Receiver's Account, etc.

In the United States District Court, Southern District of California, Central Division

No. 13,742-T

LYDA TIDWELL, et al., Plaintiffs,

vs.

FREDERICK I. RICHMAN, etc. et al., Defendants.

ORDER IN RE SETTLEMENT OF RECEIVER'S ACCOUNT, Fees and Distribution of Funds in Hands of Receiver. (Under Local Rules 7 of the U. S. District Court for the Southern District of California.)

This matter having come on for final hearing on the 27th day of September, 1954, on the First and Final Report and Account of the Receiver, Petition for Receiver's Fees and Petition for Receiver's Attorney's Fees and distribution of the balance remaining in the receiver's hands after payment of his fees and those of his attorney, plaintiff appearing by her attorneys, Martin, Hahn & Camusi, by William P. Camusi, defendant Frederick I. Richman appearing by his attorneys, Brady, Nossaman & Paulson and Joseph T. Enright, by Joseph T. Enright, and the receiver Roy E. Hallberg having appeared through his attorney, John Whyte, and oral and documentary evidence having been previously submitted to the court, and good cause appearing therefor, the court now makes its findings and order therein:

I.

This Order arises as the result of the final settlement of a suit in this court to cancel an intervivos trust and for other relief, brought by [243] plaintiff, Lyda Tidwell, against defendant, Frederick I. Richman, and others, United States District Court file No. 13,742-T. After trial of said matter on the claim of fraud and undue influence in the inception of the trust, this court gave judgment in favor of plaintiff and against defendant, and ordered that said trust be cancelled and dissolved, and this court appointed Roy E. Hallberg as receiver on December 1, 1953, to operate and conserve the assets of said trust pending a final determination of the matter by way of final judgment

or settlement between the parties. The court approved the employment by the receiver of an attorney, John Whyte, to render legal services to said receiver in connection with the administration of said trust.

II.

On February 26, 1954, pursuant to stipulation of the parties, the court ordered that the receiver be relieved of his active duties of management, control and possession of the trust assets as of 5:00 o'clock p.m., Sunday, February 28, 1954, and that he give over control and possession to plaintiff, Lyda Tidwell, of all the assets of the said trust excepting money in bank and under the control of the said receiver.

The said Order of this court, dated February 26, 1954, was made because the plaintiff and defendant had arrived at an agreement for settlement of the entire action. The settlement of the entire action between plaintiff and defendant Richman arose out of an offer made by defendant Richman to plaintiff by letter dated February 19, 1954, and as a result of said offer, plaintiff purchased all of defendant Richman's right, title and interest in and to the assets of said trust.

III.

Pursuant to stipulation, plaintiff took over possession of the assets of the trust, with the exception of money in bank and under the control of the receiver, at 5:00 o'clock p.m., February 28, 1954. In pursuance of the settlement of the action as above described, dismissal of the action was entered, this court, however,

retaining jurisdiction of the cause for the purpose of settling the accounts of the receiver, fixing the fees of the receiver and his attorney, and disposing of any balance of the funds remaining [244] in the hands of the receiver after making provision for the payment of all the receiver's operating expenses and the fees of the receiver and his attorney.

IV.

The first and final report of the receiver and petition for allowance of fee to receiver, together with petition for allowance of fees to the attorney for the receiver, were filed. After allowance for receiver's fees and fees for his attorney, plaintiff and defendant are each entitled to one-half of the funds remaining in the hands of the receiver. However, both plaintiff and defendant Richman make additional claims against said funds remaining because of certain charges which the receiver paid, or failed to pay. On or about February 28, 1954, the receiver paid the March installment due on the trust's promissory note secured by a trust deed on the Oliver Cromwell Apartment house in the sum of $2,027.27. The receiver did not pay defendant Richman any fee for services rendered by said defendant as agent for the trust for the month of November, 1953, and defendant Richman has never been compensated for said services.

Also, the receiver, having turned over the assets and books and records of the trust on February 28, 1954, did not pay certain obligations incurred prior to, and during, his administration. The receiver failed

to pay certain utility bills incurred during the month of February, 1954, in the sum of $1,877.50. The receiver also failed to pay any of the real property taxes on trust assets for the months of January and February, 1954, which taxes amount to the sum of $4,952.77. The receiver further failed to pay for two catalytic units in the sum of $1,300.00 each, or $2,600.00 for both units, which catalytic units were contracted for by defendant Richman and installed on the apartment houses during the receiver's administration. Plaintiff was not a party to the purchase of the catalytic units. Plaintiff paid the bills for utilities, taxes, and for the catalytic units from her own funds.

The first and final report of the receiver is found to be full and correct.

Now, therefore it is hereby ordered adjudged and [245] decreed that the said report as filed by the receiver is a true and correct account and the court finds that the receiver has in his possession after deducting the credits to which he is entitled, a balance of $20,697.71, consisting entirely of cash, and said account and report is approved, allowed and settled as rendered; that said receiver, Roy E. Hallberg, is hereby discharged from further duties and responsibilities as receiver herein and his bond exonerated; the reasonable value of the services of Roy E. Hallberg as receiver is the sum of $6,000.00, which the Court finds to be the reasonable value of said services, and his fees are hereby fixed at the sum of $6,000.00; the reasonable value of the services of John Whyte, as attorney for

the receiver in this matter, is the sum of $1,800.00, and his fees are hereby fixed at the sum of $1,800.00, which the Court finds to be the reasonable value thereof.

There remains on hand after allowance for payment of receiver's fees and the fees of his attorney, the sum of $12,897.71 which sum is payable to plaintiff and defendant Richman as their interests appear.

It is further ordered, adjudged and decreed that from the balance of funds remaining in the hands of the receiver in the sum of $12,897.71, defendant Richman is entitled to the following credits: A reasonable fee for services rendered by him as agent for the dissolved trust, which fee is fixed at six per cent (6%) of the gross revenue for the month of November, 1953, which revenues aggregated $31,043.33, or a fee of $1,862.60, one-half of which was the obligation of plaintiff; and defendant Richman is entitled to a credit of one-half of said mortgage payment made for the month of March, 1954, said one-half amounting to $1,013.64, or a sum total of credits of $1,944.94.

It is further ordered, adjudged and decreed that from the balance of the funds remaining in the hands of the receiver in the sum of $12,897.71, plaintiff, Lyda Tidwell, is entitled to the following credits: One-half of the said utility bills paid by her, said one-half amounting to $938.75; one-half of the said taxes paid by her, said one-half amounting to $2,476.38; one-half of the cost of the catalytic units paid by her, said one-half amounting to $1,300.00, or a sum total of credits of $4,715.13. [246]

It is further ordered that the receiver reimburse himself from the monies in his possession to the extent of $89.20, paid out by him for copies of the depositions used on the hearing herein.

It is further ordered, adjudged and decreed that the balance of said fund remaining, in the amount of $6,237.64, after allowance for receiver's fees, attorney's fees and said credits to both plaintiff and defendant Richman, be divided equally between plaintiff and defendant Richman in the amount of $3,118.82 each. Plaintiff is entitled to receive from said fund the total sum of $7,833.95, and defendant Richman is entitled to receive from said fund the total sum of $4,974.56.

It is further ordered, adjudged and decreed that plaintiff is not entitled to any credits for expenses incurred by her in said escrow on behalf of defendant Richman as the seller therein.

It is further ordered, adjudged and decreed that defendant Richman is not entitled to any credits for any rents collected by plaintiff, nor is defendant Richman entitled to any credit for the said petty cash fund paid over to plaintiff.

It is finally ordered that neither plaintiff nor defendant Richman is entitled to any credit against said fund except for those specifically hereinabove granted.

The receiver is ordered to disburse the funds in his hands in accordance herewith, except as this Court or the Appellate Court may award cost or fees to the receiver and his attorney in connection with any appeal.

Dated this 19th day of November, 1954.

/s/ ERNEST A. TOLIN,
Judge. [247]

Affidavit of Service by Mail attached. [248]
[Endorsed]: Filed and entered Nov. 19, 1954.

I, Joseph T. Enright, Attorney for Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of December, 1956, I served copies of the foregoing Petition for Writ of Certiorari on the Respondents by mailing copies thereof in duly addressed envelopes with postage prepaid, to Respondents' Counsel, as follows:

Martin, Hahn & Camusi, 701 Security Title Insurance Bldg., Los Angeles 14, California; John Whyte, 756 South Broadway, Los Angeles 14, California.

JOSEPH T. ENRIGHT,
Attorney for Petitioners.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956
No. 665

FREDERICK I. RICHMAN,

Petitioner,

vs.

LYDA TIDWELL, ROY E. HALLBERG, as Receiver of all the real and personal property constituting the former Richman Trust, and JOHN WHYTE, Attorney for Receiver,

Respondents.

Brief of Respondents Roy E. Hallberg, as Receiver of All the Real and Personal Property Constituting the Former Richman Trust, and John Whyte, His Attorney, in Opposition to Petition for Writ of Certiorari.

Foreword.

In the interest of brevity, petitioner Frederick I. Richman will hereinafter sometimes be referred to as "Richman"; respondent Roy E. Hallberg, as Receiver of all the real and personal property constituting the former Richman Trust, will be referred to as "the Receiver" or "Hallberg"; and respondent John Whyte, the Receiver's attorney, will sometimes be referred to as "Whyte."*

*Although the law firm of Fitzpatrick & Whyte and John Whyte were, by order of the District Court, employed as counsel for the Receiver [R. 29-30], both the Court of Appeals in its opinion (Pet. for Cert., App., p. 7) and judgment (*Idem*, p. 17), and the District Court in its order *re* settlement of the Receiver's account, fees and distribution of funds in hands of Receiver (*Idem*, pp. 18, 21-22), spoke of the Receiver as if he had but one attorney, John Whyte.

Statement of the Case.

Petitioner's Statement of Facts contains so many inaccuracies and omissions of material facts that respondents Hallberg and Whyte deem it necessary to correct a number of the misstatements made therein and to supply certain facts omitted therefrom.

Richman asserts at page 7 of his petition that appellant Lyda Tidwell (a respondent in this Court) did not controvert the charges of gross abuse of judicial discretion made by Richman at pages 16-46 of his opening brief in the Court of Appeals with reference to the conduct of the Receiver and the Trial Judge. This statement is not true. At page 6 of her brief in the Court of Appeals appellant Tidwell stated:

> Lyda Tidwell has never objected to the accuracy of the receiver's report nor to the award of reasonable fees to the receiver and his attorney, nor has she asked that the receiver be surcharged, *since the receiver did no wrong,* and the balance remaining in his hands is sufficient to settle in full all remaining disputes between Tidwell and Richman as to credits and debits, which each claims against the other in the final settlement of their disputes and division of the funds. (Emphasis supplied.)

Richman also asserts at page 7 of his petition that respondents Hallberg and Whyte admitted most of the occurrences set forth at pages 16-46 of his opening brief in the Court of Appeals, except that they alleged that some minute details were colored. This statement is likewise untrue. At pages 2-3 of their brief in the Court of Appeals said respondents declared that the material set out at pages 16-46 of Richman's opening brief in that court was "misleading, biased, incomplete, inaccurate and un-

true" in that such material omitted numerous facts relevant to a determination of the issues, contained many statements unsupported by any reference to the record, and was replete with instances where the reference to the record did not uphold the statement made.

At pages 7-8 of his petition Richman lists five representations allegedly made by the Trial Judge to the parties, each of which was assertedly confirmed by the Receiver and each of which was assertedly false in whole or in part.

With respect to the first alleged representation that "the proposed receiver was able, competent and experienced in income property management," while petitioner's reference to the record [R. 204] does not support his assertion that the Trial Judge made such a statement, nevertheless the proposed receiver met all these qualifications, as will shortly appear from the discussion below.

With respect to the second and third alleged representations that the proposed receiver "was for some years associated with a property management operation in Chicago," and that his "main vocation for some years was in the management of real properties, sometimes in connection with receiverships," these statements were true. The record discloses that from 1930 to 1931, in Chicago, Illinois, Hallberg was employed by a receiver on a full-time basis to manage certain real properties in receivership. The properties consisted of from 40 to 50 buildings, including apartments, a large apartment hotel, flats, bungalows, and residences. The buildings as a whole were of about the same class as the buildings which constituted the principal assets of the receivership under consideration here. [R. 377-378, 381-383, 465-466, 884-885.]

With respect to the fourth alleged representation that the proposed receiver "had managed apartment property for elderly relatives in Southern California," while this representation was slightly garbled by the Trial Court in that Hallberg had hired his mother-in-law as manager of one of his apartment properties in that area instead of managing it for his mother-in-law [R. 369], the basic idea which the court was attempting to express was true, that idea being that Hallberg was experienced in managing real properties in Southern California. In this connection the record shows that before his appointment as the Receiver, Hallberg had managed real properties owned by himself and his wife consisting, among others, of a 16 unit apartment building in South Pasadena, California, and a four family unit in Pasadena, California. [R. 369-370, 881-882, 889-891.]

With respect to the fifth alleged representation that the proposed Receiver's "place of business" was in Pasadena although he lived in Corona del Mar, what the Trial Judge actually said was that he thought Hallberg had "a place of business somewhere around San Gabriel or San Marino, or South Pasadena," to which Hallberg replied that it was in Pasadena. [R. 215.] This was a perfectly truthful statement inasmuch as the four family unit owned by Hallberg and his wife in Pasadena [R. 370] certainly qualifies as "a place of business" in that community.

With respect to the sixth alleged representation that the proposed receiver was available to act, that statement was likewise true. At the time the statement was made by the Trial Court on November 30, 1953 [R. 202, 205], the proposed receiver did not know that he would shortly be employed by the County of Orange in the State of Cali-

fornia [R. 363, 378-379, 355-357]; and such employment did not begin until December 7, 1953. [R. 326.] Moreover, this County position had no definite hours of employment but merely required Hallberg to put in a 40 hour week of eight hours a day, Monday through Friday. [R. 327-328, 335, 343, 346-347.] Inasmuch as about half this work could be done outside the office or at home during the evenings [R. 356-360], Hallberg found sufficient time to supervise the management of the receivership assets on Fridays, Saturdays, and Sundays, as well as some other days and evenings of the week. [R. 434-435, 905.] Furthermore, he had the assistance of a full-time bookkeeper during the entire course of the receivership [R. 270, 410-411] and in addition was materially aided by his wife who, without compensation [R. 269], supervised the decorating of apartments, made periodic trips to collect the rents and deposited them in the bank, purchased supplies, and helped with the bookkeeping. [R. 263-265, 267-268.]

It is also not amiss to point out that Richman, the petitioner herein, who formerly managed the assets of the receivership, had carried on a private law practice and other ventures at the same time. [R. 528-529, 713-715, 731-732.] Knowing this to be the fact, the Trial Court envisaged Hallberg's job as Receiver as only "part-time employment" at the time that it appointed him to the position. [R. 257-258.]

Two further facts should be noted with reference to the aspersions cast by petitioner upon the Receiver's ability and integrity. At the hearing on November 30, 1953, when the Trial Court indicated that Hallberg would be appointed as the Receiver, petitioner's counsel declared that "I am satisfied that your Honor would not have selected anyone except a man of not only integrity, but of

ability" [R. 210]; and he further declared that "never do I question the appointment upon the ground of the integrity of this man or qualifications, because I have no doubt that the court thoroughly investigated that aspect before ever selecting" Mr. Hallberg. [R. 211.] When the court invited counsel for Richman and Mrs. Tidwell to ask the proposed receiver any questions they desired before he was appointed, no questions were asked. [R. 210-216, 259.]

At page 9 of his petition Richman makes the statement (with no supporting reference to the record) that Hallberg's "last previous employment had been by a fishing pole manufacturer at $350.00 a month." This statement was undoubtedly designed to create the impression that the Receiver was a "small bore" businessman of very limited earning capacity. Nothing could be further from the truth. During the last three or four years of his employment by the Garrett Company in New York, Hallberg received an annual net compensation (before taxes) of $40,000. [R. 891-892, 367-368.] He came to California about January 1947, as Western Regional Sales Manager for Refrigeration Corporation of America at a salary of $10,000 a year, plus an "override" based on volume. [R. 875.] Although he developed severe trouble with his back about 1949 [R. 875-876, 366-367], he still earned a salary of $20,000 a year from October 1948, to April 1951, while employed by Hall Industries, a seller of curtain rods. [R. 379-881.]

At page 10 of his petition Richman asserts that because of the Receiver's alleged dereliction of duty, the receivership assets were grossly mismanaged. Two allegedly representative instances are cited as illustrations. The first asserted illustration is that the Receiver was not available when the refrigeration facilities in one of the apartment

houses failed. Not only does Richman fail to support this statement with any reference to the record but the statement is also untrue. A report of the mishap was made to the Receiver on the evening of the same day on which the trouble occurred, and he was informed that the refrigeration repairmen were on the job. [R. 285.] Before noon the following day the Receiver conferred with the representatives of two refrigeration companies and instructed one of them to finish the job of repair. [R. 286, 435-439.] Two days after the breakdown he visited the apartment house in question and found the refrigeration system working perfectly. [R. 435-436, 525.]

The second asserted illustration is that after a smog control citation was served upon one of the apartment house managers and a criminal warrant issued for Richman's appearance in court, Richman was unable to locate the Receiver and find out what had happened. The reference to the record given by petitioner [R. 643] fails to support this charge in any particular, but even if it were true petitioner has neither alleged nor shown that the receivership or its assets suffered the slightest harm as a result of the events which he alleges took place.

On page 11 of his petition Richman mentions the fact that he filed a petition with the District Court requesting that the Trial Judge disqualify himself from hearing the Receiver's report and petition for fees and the petition of his attorney for fees on the ground that the Trial Judge was a material witness to asserted misrepresentations made by the Receiver as to his experience, qualifications and availability under Title 28, U. S. C., Section 455. The petition to disqualify alleged that it would be necessary for Richman to call the Trial Judge as a witness to these alleged misrepresentations. [R. 162.]

As this Court will have observed from the facts hereinbefore set forth, neither the Trial Court nor the Receiver made any misrepresentation, with the minuscule exception that the Trial Court was mistaken in declaring that Hallberg had managed apartment property in Southern California for elderly relatives whereas in fact an elderly relative (his mother-in-law) had acted as manager of one of his apartment properties in that area. Furthermore, everything said at the hearing at which it is claimed that the Receiver made the alleged misrepresentations was transcribed by the court reporter and is a part of the record on this appeal. [R. 202-216.] The Receiver has never repudiated any part of the transcript of that hearing.

With reference to the reasonableness of the $6,000 fee awarded by the Trial Court to Hallberg for his services as Receiver, certain facts should be brought to the attention of this Court which are not mentioned in Richman's petition. An expert witness as to the management of real estate in the Los Angeles area testified that, based upon the size of the receivership estate (it was valued at approximately $1,200,000) [R. 724], the duties performed by the Receiver, his education and past employment, the size of his bond ($75,000) [R. 25-26], and the amount of gross receipts collected during the three months' period of the receivership ($94,153.59) [Sched. B to Final Report of Receiver; R. 105, 277-278, 295], he was of the opinion that the reasonable value of the Receiver's services was 5% of gross income [R. 301-306, 316, 324, 325], which would be $4,707.67.

Although the fee awarded by the District Court was about $1,300 in excess of this figure, the Trial Judge

noted the presence of several additional factors which fully justified such an increase when he stated:

> "The Receiver has not prayed for a specific sum in compensation for his services but has set forth in detail what his services consisted of and prays for reasonable fees. The Court bears in mind that Defendant has testified that ten per cent of the gross income was a reasonable management fee when Defendant rendered the management service. In procuring the contract with Plaintiff for that fee, there was an over-reaching and undue influence. That fee was excessive. The Court bears in mind, also, that there is evidence in the record that various percentages including five per cent and six per cent would be a reasonable management fee. The Receiver in this instance acted as a property manager with the obligations of full trustee and of an officer of the Court. Mr. Richman, with whom he had to deal, is a person given to hostile and aggressive attitudes. It is evident that he exercised these in his relations with the Receiver. The Receiver was obliged to go through the problem of setting up his own management plan. [234.] He was only allowed to execute the plan for a brief period before the receivership was abruptly terminated. He was placed in possession hurriedly and he was terminated abruptly. It then became necessary for him to file an accounting, and the accounting procedure was exhausted to its ultimate in searching into the conduct of the Receiver during and even before his stewardship. He spent several days in Court defending the administration of his trust and undergoing a most critical and insulting scrutiny of his every act and omission in his administration. The Receiver's fee is fixed in the sum of $6,000.00, that being the reasonable value of his services, with some consideration given to the greater than usual vexation

which was visited upon him and the labors of making up his accounting and explaining and defending it in Court. The Court finds it to be a true and correct account." [R. 186-188.]

As to the manner in which the Receiver was treated by Richman and his counsel, the Trial Court remarked:

> "He was brought before the court almost as if he were accused of a crime here and was treated by some of the parties to the suit, or by one of the parties to the suit and one of the attorneys to the action with less respect than I have seen embezzlers treated when I was handling the criminal calendar of the court." [R. 858-859.]

Summary of the Argument.

1. This Court should not disturb discretionary rulings of the District Court unless there is a clear showing that its discretion has been abused. No such showing has been made here.

2. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. No such reason appears here.

3. Inasmuch as there is no ground for granting the writ of certiorari, and it appears that the writ was sought for purposes of delay, this Court should not only allow interest on the respective fees of the Receiver and his attorney from the date of the entry of the judgment below until such fees are paid, but it also should adjudge to respondents Hallberg and Whyte reasonable damages for the delay in payment of their fees.

ARGUMENT.

I.

The District Court Did Not Abuse Its Discretion in Exercising Its Authority in the Manner Complained of by Petitioner.

Petitioner summarizes in the following language, appearing at page 7 of his petition, the acts of the Trial Court which allegedly constituted an arbitrary exercise of its discretion:

> "This petition is directed solely to the propriety of the trial Judge's conduct in selecting such receiver, rejecting objections by the parties as to the competency and ability of such receiver, refusing to later disqualify himself when the receiver's dishonesty and inexperience became known, and granting excessive receiver's fees ridiculously disproportionate to the services actually rendered."

The law is firmly established that where an appellate court has power to review the exercise of judicial discretion, the inquiry is confined to whether the situation and the circumstances clearly show an abuse of discretion, that is, arbitrary action by failure to apply appropriate equitable and legal principles to the established or conceded facts and circumstances. (*Home Owners' Loan Corporation v. Huffman* (8th Cir., 1943) 134 F. 2d 314, 317; *Creedon v. Warner Holding Co.* (8th Cir., 1947) 162 F. 2d 115, 118; *Graves v. Mount Vernon Trust Co.* (2d Cir., 1934) 69 F. 2d 101.)

We submit that the facts recited in our Statement of the Case effectively rebut Richman's contention that the Trial Court abused its discretion in the particulars specified in the above quoted paragraph from page 7 of his

petition. Thus, there was no impropriety in the Trial Judge's conduct in selecting the Receiver since Hallberg was in fact able, competent and experienced in the management of real properties [R. 369-370, 377-378, 381-383, 465-466, 881-882, 884-885, 889-891] and was available to act to the extent required for the proper performance of his duties in supervising the operation of the receivership [R. 327-328, 335, 343, 346-347, 356-360, 434-435, 905, 257-258], aided, as he was, by a full-time bookkeeper and by the services of his wife performed without charge. [R. 263-265, 267-270, 410-411.] At the time of the Receiver's appointment, counsel for petitioner expressed himself as being satisfied to rely upon the Trial Court's choice of Hallberg as Receiver. [R. 210-211.] When the Court invited petitioner's counsel to question the proposed receiver, no questions were asked. [R. 210-216, 259.]

With respect to petitioner's charge that the Trial Judge improperly rejected objections by the parties to the competency and ability of the Receiver, as we have seen respondent Tidwell raised no such objections. (Tidwell Br. in Ct. of Appeals, p. 6.) As for the objections raised by Richman after the Receiver had been appointed, such objections were properly rejected because the Receiver was both competent and able to perform his duties in a satisfactory manner.

Richman's next charge is that the Trial Judge improperly refused to disqualify himself when the Receiver's alleged dishonesty and inexperience became known. As we have pointed out, Richman has failed to demonstrate in his distorted and abridged Statement of Facts (Pet. for Cert., pp. 6-12) that the Receiver was dishonest or inexperienced. The uncontroverted facts set forth in our

Statement of the Case show that there is no substance to such an accusation.

Furthermore, no ground for disqualification of the Trial Judge has been stated within the purview of Title 28, U. S. C., Section 455. That section provides that any "judge of the United States shall disqualify himself in any case [1] in which he has a substantial interest, [2] has been of counsel, [3] is or has been a material witness, or [4] is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein." The alleged ground of disqualification relied on by Richman is the third one mentioned in the section, that is to say, he contends that the Trial Judge was a material witness to alleged misrepresentations of the Receiver, assertedly made before his appointment to that office, as to his experience, qualifications, and availablility. [R. 159; Pet. for Cert., p. 11.]

As we have heretofore taken pains to point out, the Receiver made no misrepresentations. In any event, everything said during the hearing at which Richman claims that the Receiver made the alleged misrepresentations was transcribed by a court reporter and is a part of the record on this application for writ of certiorari. [R. 202-216.] The Receiver never repudiated any portion of the transcript of that hearing. Under these circumstances it would have been unnecessary for Richman to have called the Trial Judge as a witness inasmuch as the transcript would have supplied all the evidence necessary.

Richman's final charge is that the Trial Court abused its discretion in granting excessive Receiver's fees disproportionate to the services rendered. The facts hereinabove set out on pages 8-10 are a sufficient answer to

this contention. Such facts were amply sufficient to support the Trial Court's finding that the reasonable value of the Receiver's services was $6,000. It is well recognized that in fixing compensation of receivers, attorneys and other such officers of the court, the lower court usually has better knowledge of what services were rendered and better means of determining how valuable those services were to the trust than has the appellate court, and the latter court is always reluctant to disturb the action taken by the lower court. *In re West Counties Const. Co.* (7th Cir. 1950) 182 F. 2d 409, 410-411; *Northern Alabama Ry. Co. v. Hopkins* (5th Cir. 1898) 87 Fed. 505, 509; *Roth v. Reich* (2d Cir. 1947) 164 F. 2d 305, 311.

We submit that this Court should refuse to disturb the action of the District Court in awarding a fee of $6,000 to the Receiver in the absence of a clear showing that the evidence did not warrant a fee of this size. Such a showing has not been, and cannot be, made by petitioner.

II.

No Sufficient Reason Exists for Granting a Review on Petitioner's Application for Writ of Certiorari.

Rule 19 of the Rules of this Court declares that a review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The character of the reasons which will be considered is set out in the rule, one such reason being where a court of appeals "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision." This is the reason relied on by petitioner (Pet. for Cert., pp. 3, 14), his

theory apparently being that the Court of Appeals sanctioned such a departure by the District Court.

A writ of certiorari is rarely, if ever, granted for this reason. In an article in (1934) 48 Harvard Law Review 238, coauthored by Mr. Justice Frankfurter, the reason is quoted at pages 273-274, followed by this statement:

> "The ratio of successful to attempted invocations of this reason is smaller than that of any other. To scores of petitioners each year any asserted error in the decision of a case, however minute and of whatever character, is such a departure 'from the accepted and usual course of judicial proceedings' as to call for an exercise of the Supreme Court's power of supervision. Of course, the reason refers neither to errors of law nor to minor departures from customary practice. It refers to matters of major concern to the integrity of the federal judicial process. How rarely the Supreme Court regards as necessary any intervention on this ground appears from the fact that no single grant of *certiorari* last term was attributable to it."

See also *Houston Oil Co. of Texas v. Goodrich* (1918) 245 U. S. 440, 62 L. Ed. 385.

Surely no matter of "major concern to the integrity of the federal judicial process" is presented by this petition for certiorari. In fact, petitioner has not even succeeded in establishing a minor departure on the part of the lower court from customary practice in judicial proceedings.

III.

This Court Should Not Only Allow the Receiver and His Attorney Interest on the Respective Amounts of Their Fees Awarded by the Judgment of the District Court but Also Should Adjudge to Such Respondents Reasonable Damages for the Delay in Payment of Such Fees.

Rule 56 of the rules of this Court provides in part as follows:

> *"Rule 56. Interest and damages*
>
> "1. Where judgments for the payment of money are affirmed, and interest is properly allowable, it shall be calculated from the date of the entry of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the State where such judgment was rendered.
>
> "2. In all cases where an appeal delays proceedings on the judgment of the lower court, and appears to have been sued out merely for delay, damages at a rate not exceeding 10 per cent., in addition to interest, may be awarded upon the amount of the judgment.
>
> * * * * * * * *
>
> "4. Where a petition for writ of certiorari has been filed, and there appears to be no ground for granting such a writ, the court may, in appropriate cases, adjudge to the respondent reasonable damages for his delay."

Under the law of the State of California, judgments similar to the judgment rendered by the District Court, to the extent that it ordered the payment of money as fees to the Receiver and his attorney in the respective amounts of $6,000 and $1,800 [R. 193-194], bear in-

terest at the rate of 7% per annum. In this regard Section 22 of Article XX of the California Constitution reads in part as follows:

> "§22. *Interest rates*
>
> Sec. 22. The rate of interest upon the loan or forbearance of any money, goods or things in action, or on accounts after demand or judgment rendered in any court of the State, shall be 7 percent per annum but it shall be competent for the parties to any loan or forbearance of any money, goods or things in action to contract in writing for a rate of interest not exceeding 10 percent per annum."

Hence, under the rules of this Court respondents Hallberg and Whyte are entitled to interest on the amounts of their respective fees at the rate of 7% per annum from the date of the entry of the judgment below, which was November 19, 1954 [R. 196], until such amounts are paid.

We submit that these respondents should also be awarded reasonable damages for the delay in payment of their respective fees. It seems obvious that petitioner is seeking a writ of certiorari primarily for purposes of delay. He must know that his slurs against the Receiver and the Trial Judge have no foundation in fact. Indeed, the Court of Appeals thought so little of his appeal insofar as the same attacked that portion of the District Court's judgment dealing with the Receiver and his counsel that it disposed of said appeal in one small paragraph in an opinion which occupies nearly six pages in the Federal Reporter. (234 F. 2d 361.) Under these circumstances this Court should award these respondents damages for the delay in payment of their fees which has resulted from Richman's application for a writ of certiorari.

Conclusion.

For the reasons stated above, it is respectfully submitted that this case is not a proper one for review by certiorari in this Court, and that the petition for a writ of certiorari should be denied. It is further submitted that this Court should order that interest be allowed on the respective amounts of the fees awarded by the judgment of the District Court to the Receiver and his attorney, from the date of the entry of the judgment below until paid, at the same rate that similar judgments bear interest in the courts of the State of California. It is further submitted that in addition to such interest this Court should order that damages be paid by petitioner to the Receiver and his attorney, respectively, in amounts which this Court deems reasonable.

Respectfully submitted,

RICHARD FITZPATRICK,

JOHN WHYTE,

Attorneys for Respondent Roy E. Hallberg, as Receiver.

JOHN WHYTE,

In Propria Persona.

FITZPATRICK & WHYTE,

Of Counsel.

Service of the within and receipt of a copy thereof is hereby admitted this_____ day of January, A. D. 1957.

_____

_____

Encl.

1-22-57—5M